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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Policy and Rules Concerning the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	CCB/CPD No. 97-54
Implementation of Section 254(g) of the Communications Act of 1934, as amended	)	

COMMENTS OF COMCAST CELLULAR COMMUNICATIONS, INC. ON PETITIONS FOR RECONSIDERATION

Comcast Cellular Communications, Inc. ("Comcast") submits these comments in response to petitions for reconsideration of the Commission's *First Memorandum Opinion and Order and Order on Reconsideration*, in the above captioned proceedings.[1/] Comcast is a regional cellular service provider with customers in Pennsylvania, Maryland, New Jersey and Delaware. In addition, an affiliate of Comcast, Comcast PCS Communications, Inc., is a licensee of PCS spectrum in the Philadelphia, PA, MTA and Allentown, PA BTA and another affiliate of Comcast is a licensee of WCS spectrum in markets throughout the United States.

As described in its comments in support of the PrimeCo Personal Communications, L.P. ("PrimeCo") Motion for Stay of Enforcement of the Commission's rate integration policy as it applies to CMRS carriers, Comcast would be adversely affected by application

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1/ In the matter of Implementation of Section 254(g) of the Communications Act of 1934, *First Memorandum Opinion and Order on Reconsideration*, CC Docket No. 96-61, FCC 97-269 (released July 30, 1997) ("*Reconsideration Order*").

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of the FCC's interexchange rate integration policy to CMRS providers.[2/] The FCC recognized some of these adverse impacts when it partially granted PrimeCo's motion, conditioned on the resolution of the issues in this reconsideration proceeding.[3/]

Comcast submits these comments in support of the seven petitions for reconsideration filed by CMRS carriers, all of which demonstrate that the legislative history of Section 254(g) of the Telecommunications Act of 1996 ("1996 Act") cannot be construed to apply to CMRS carriers. As many of these petitions state, applying a rate integration requirement across affiliates of CMRS providers would have significant anticompetitive effects, including a reduction of price competition in the wireless industry. Even within a company, application of rate integration policies could stymie efforts to create different tiers of services to be responsive to the needs of various niche markets. This plainly is inconsistent with the public interest. Further, it is not clear how the FCC intends for a rate integration rule to apply to particular CMRS offerings — including in the context of roaming — which are structured in fundamentally different ways than interstate, interexchange wireline services.

2/ *See* Motion for Stay of Enforcement of PrimeCo Personal Communications, L.P., CC Docket 96-61 (filed September 23, 1997).

3/ The FCC maintained in effect rate integration requirements upon providers of CMRS services, but stayed the FCC requirement that interstate interexchange CMRS providers integrate rates across affiliates. The FCC also stayed application of rate integration requirements with respect to wide area rate plans that are widely offered by CMRS providers.

I. CMRS CARRIERS WERE NOT PART OF THE STATUS QUO PRESERVED BY SECTION 254(g)

The legislative history on interstate, interexchange rate integration in Section 254(g) could not be more plain: "the conferees intend the Commission's rules to require geographic rate averaging and rate integration, and to incorporate the policies contained in the Commission's [1976 Integration of Rates and Services Order]."[4/] Congress merely intended to codify the FCC's pre-existing rate integration policies, which did not include CMRS carriers. In other words, Section 254(g) preserved the *status quo* and CMRS rate integration is not part of that *status quo*. A rate integration rule that applies to CMRS carriers is inconsistent with the intent of Section 254(g) as reflected in the legislative history because Congress did nothing more than codify existing rate integration policies.

Even if the 1996 Act could be construed to allow the FCC to apply rate integration to CMRS rates, fundamental notions of fairness and the Administrative Procedure Act's ("APA") notice requirement would cut against this result. Section 553(b) of the APA is designed to require agencies to provide adequate notice of proposed rules so that potentially affected parties may file comments on pending rulemakings. The FCC's *Notice* did not provide adequate disclosure of any intention to extend rate integration principles beyond landline carriers and it is uncontroverted that in response to the FCC's *Notice* in this proceeding, *not one party* filed comments addressing the complex and novel issue of CMRS

4/ H.R. Conf. Rep. No. 104-458 at 132 reprinted in 1996 U.S.C.A.A.N. 124, 143-44 (*Joint Explanatory Statement*).

rate integration.[5/] The FCC's *Notice* cannot be considered broad enough to extend, even by implication, to the FCC's consideration of something as significant as the industry-wide integration of interexchange CMRS rates if no party was specifically aware of the FCC's intent to adopt CMRS rate integration policies.[6/]

II. FORCING CMRS CARRIERS TO INTEGRATE INTERSTATE INTEREXCHANGE RATES WITH "AFFILIATES" CAUSES SERIOUS COMPETITIVE CONCERNS

Only after the FCC's initial *Order* did any CMRS industry participant recognize the possibility of Commission over-extension of its rate integration policy to CMRS. In response to GTE's request for clarification that covered a wide range of issues beyond CMRS rate integration, the FCC determined not only that its rate integration policies should apply to CMRS, but that rate integration should apply among all CMRS affiliates.[7/]

5/ Indeed, the FCC "clarified" its view of CMRS rate integration only in response to a request filed as part of a much broader petition for reconsideration of the initial order filed by GTE.

6/ In this same proceeding, when the FCC imposed rate integration for Guam, the Northern Marianas and American Samoa for the first time, it granted affected interexchange carriers a transition period of approximately one year. Under this approach, the FCC should have also given CMRS carriers a similar transition period. The fact that the FCC did not do so suggests either that it did not appreciate that CMRS providers were not previously rate integrated or that the disruptive impact of such a decision was underestimated.

7/ Section 3(1) of the 1996 Act provides that an "affiliate" is "any person that directly or indirectly owns or controls a 10 percent equity interest in another company." Section 32.9000 of the FCC's accounting rules defines "affiliated companies" as "companies that directly or indirectly through one or more intermediaries, control or are controlled by" another company. "Control" is defined as "the power to direct or cause the direction of the management and policies of a company." *See* 47 C.F.R. § 32.9000. For purposes of the initial PCS eligibility rules, the FCC determined that ownership interests as low as 5% would be considered as attributable affiliation relationships. Later the FCC modified the relevant attribution levels in CMRS to be triggered at a 20 percent or greater ownership

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This decision was apparently based upon the broadest interpretation of the phrase "telecommunications carrier," without much consideration for the legislative history of Section 254(g), the inconsistency of such a policy with existing CMRS ownership structures or CMRS market dynamics. Even in reaching this conclusion, the FCC did not consider the substantial forbearance authority granted to it under Section 332(c)(1) of the Communications Act.

Comcast supports the petitioners requesting reconsideration of the FCC's decision to apply the current definitions of "affiliate" and "control" to determine when CMRS companies are sufficiently related so as to require the integration of rates.[8/] Like other CMRS providers, Comcast is concerned that its relationships (or the relationships of its parent corporation) with other CMRS partnerships or joint ventures will be treated as "affiliation," leading to a requirement of uniformity in CMRS interstate "interexchange" pricing.[9/]

7/ (...continued)
level. Carriers that structured their CMRS business relationships in reliance on the PCS and more general CMRS rules should not be subjected to inconsistent affiliate obligations in the area of rate integration. Indeed, the FCC's rules are not plain regarding which of these differing affiliation standards it intends to apply.

8/ *See* Petition for Reconsideration or in the Alternative Forbearance of PrimeCo Personal Communications, L.P. at Page 15; Petition for Reconsideration and Forbearance of BellSouth Corporation at Page 21; Petition for Reconsideration of AirTouch at Page 13.

9/ As the FCC is already aware from the concerns raised by CMRS providers and their industry associations regarding open issues on the FCC's Form 457, the Universal Service Worksheet, CMRS offerings often do not fit into traditional notions of landline service. Indeed, the FCC recognized this critical difference when it determined that CMRS local calling areas were MTAs rather than landline areas in its *Local Competition Order*. *See Local Competition Order* at ¶ 1036. *See also* 47 C.F.R. § 51.701 (b)(2). With MTAs adopted
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If the FCC had provided adequate notice that it was considering applying rate integration rules to CMRS, it would have developed a record to document that one characteristic of CMRS, as a vestige of cellular licensing practices and co-ventures in PCS auctions, is joint ownership of systems by multiple companies that vary on a market-by-market basis.[10/] These arrangements may often trigger the FCC's statutory affiliation threshold. For example, Comcast's parent, Comcast Corporation, holds an indirect 15 percent interest in Sprint Spectrum, L.P. d/b/a Sprint PCS ("Sprint PCS"), which holds PCS licenses in many markets nationwide.[11/] PhillieCo is an affiliate of Comcast's other partners in Sprint PCS, and competes against Comcast's cellular offerings within the Philadelphia MTA.[12/] If the FCC were to apply its statutory affiliation standard, Comcast and PhillieCo could be considered affiliates and would have to mirror each other's CMRS

9/ (...continued)
as the relevant local calling areas for CMRS providers, any application of an interstate, interexchange rate integration policy became virtually impossible to define, let alone to administer.

10/ Comcast is concerned that inquiries into the unique market characteristics of the CMRS industry are too often omitted — as in this proceeding.

11/ Sprint PCS is a joint venture formed by subsidiary partnerships or corporations of Sprint Corporation ("Sprint"); Cox Communications, Inc. ("Cox"), Telecommunications, Inc. ("TCI") and Comcast Corporation ("Comcast Corp."). Sprint, through subsidiaries and partnership interests, holds a 40 percent interest in Sprint PCS; TCI, through subsidiaries and partnership interests, holds a 30 percent interest in Sprint PCS; Cox, through subsidiaries and partnership interests, holds a 15 percent interest in Sprint PCS. Comcast Corp., through subsidiaries and partnership interests, also holds a 15 percent interest in Sprint PCS.

12/ Sprint, through Sprint Spectrum Holding Company, L.P. ("Holdings"), holds a 47.1 percent interest in PhillieCo Partners I, L.P. Cox and TCI hold 35.3 percent and 17.6 percent interests in PhillieCo Partners I, L.P., respectively. PhillieCo I, L.P.'s subsidiary, PhillieCo, L.P., holds a B block PCS license for the Philadelphia MTA.

interexchange rates, stifling any form of price competition for interexchange CMRS services in the Philadelphia MTA. Requiring this form of rate integration would further lead to "daisy chain" effects as joint venturers integrate their rates with other affiliates who may be competitors in other markets across the country.[13/]

The FCC's rate integration rule may also run afoul of established antitrust principles. Merely because the FCC CMRS rate integration requirement is governmentally sanctioned does not mean that carriers following FCC direction will not expose themselves to antitrust liability. The legislative history of the 1996 Act reveals that Congress, by amending Section 601, repealed express antitrust immunity and ended "the Commission's ability to confer antitrust immunity" to get both the Department of Justice and the FCC "back to their proper roles."[14/] Forcing CMRS rate integration raises significant questions of antitrust liability that the FCC is obligated to carefully consider. Indeed, to comply with the FCC's integration rule, competitors would have to exchange and continually update competitively sensitive rate information rather than operate competitive wireless businesses.[15/]

13/ Even within the same company a requirement of rate integration could well prevent a CMRS provider from implementing differing service tiers to respond to niche market demands.

14/ *Joint Explanatory Statement* at 201.

15/ *See generally* Hovenkamp, FEDERAL ANTITRUST POLICY at § 5.3 detailing the anticompetitive effects of competitor exchanges of price information.

III. APPLICATION OF THE RATE INTEGRATION RULE TO CMRS CARRIERS IS PARTICULARLY PROBLEMATIC IN THE ROAMING CONTEXT

Another complicating aspect of any attempt to apply rate integration to CMRS was alluded to in the petitions filed by CTIA and BellSouth: namely, how is the rate integration rule to be applied to calls made by roamers?[16/] For example, when Comcast's customers roam onto other systems, would the interstate interexchange charges assessed to the roamer be integrated with the Comcast system or the roamed-upon system? How would carriers uniformly distinguish interstate interexchange roaming traffic? These unanswered questions highlight that even if the FCC could fashion a workable roaming rate integration policy, it would suffer from the same anti-competitive defects of the more generally applied CMRS rate integration policy.

IV. CONCLUSION

For the reasons stated above, Comcast agrees with the petitions for reconsideration filed by CMRS carriers and respectfully requests that the Commission reconsider the

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16/ *See* Petition for Clarification, Further Reconsideration and Forbearance of the Cellular Telecommunications Industry Association at Page 5; Petition for Reconsideration and Forbearance of BellSouth at Page 16.

application of the Section 64.180 rate integration requirement to interstate interexchange traffic of CMRS carriers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, a secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 31st day of October, 1997, copies of the foregoing "Comments of Comcast Cellular Communications, Inc. on Petitions for Reconsideration" were sent, via first class mail, postage pre-paid, to the following:

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